

VIA Email: Garcia.Bert@epa.gov

September 24, 2021

Mr. Bert Garcia
Water Division Deputy Director
EPA Region 8

RE: State of North Dakota Water Quality Standards review

Dear Mr. Garcia:

I am writing to inquire on the status of Environmental Protection Agency's (EPA) review of North Dakota's revised Water Quality Standards (WQS), which were submitted to EPA for approval on June 15, 2021. Before submitting its revised WQS to EPA, the North Dakota Department of Environmental Quality (DEQ) conducted a thorough triennial review that met 40 C.F.R. § 131.20's requirements. The resulting revised WQS comply with 40 C.F.R. § 131.5 and should be approved by EPA without further delay.

DEQ began its triennial review of the WQS, as required under 40 C.F.R. § 131.20, on July 12, 2019. This included both an internal review and solicitation of views from the public on the current WQS. As required in 40 C.F.R. § 131.20(a), DEQ's internal review included a comparison of the current WQS with EPA's recommended water quality criteria published pursuant to Section 304(a) of the Clean Water Act (the "304(a) recommended criteria"). Refer to Table 1.

Table 1. Chronic Aquatic Life Mercury Criteria¹

Table/CWA Section	CAS No	Name	Chronic (Total) µg/L	Chronic (Dissolved) µg/L
ND WQ STD Pre-2021	7439-97-6	Mercury	0.012	
Current CWA 304(a) Recommended	7439-97-6 22967-92-6	Mercury Methylmercury	0.885 ²	0.77
ND WQ STD Proposed	7439-97-6	Mercury	0.88	0.75

¹North Dakota aquatic life criteria values for mercury is expressed as the total recoverable method for ambient metals analyses while the National Recommended Water Quality Criteria aquatic life values of metals are expressed as total dissolved analysis. ²The conversion factor for mercury (National Recommended Water Quality Criteria - Aquatic Life Criteria Table (Appendix A)) has been used to convert between total recoverable and dissolved values.

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Prior to the public comment period, DEQ contacted EPA to request confirmation on the appropriate total recoverable mercury chronic criteria for aquatic life. (Refer to 12/05/2019 email from P. Wax.) EPA confirmed in writing that the 304(a) recommended criteria is 0.77 µg/L (chronic). During these discussions, EPA staff stated they have a “fundamental problem” with both the historical North Dakota criteria of 0.012 µg/L and the current 304(a) recommended criteria of 0.77 µg/L, but did not propose an alternative, nor provide a legal or scientific basis not to adopt the 304(a) recommended criteria.

Subsequently, on August 19, 2020, DEQ proposed for public comment its revised WQS, which included the 304(a) recommended criteria for mercury. The DEQ did not receive any comments from the EPA on this proposal. DEQ did receive one comment from the public regarding the proposed mercury criteria. In responding to this comment the DEQ states:

The departments reasoning behind proposing a change to mercury is based on the most current science. The historical criteria of 0.012 µg/L is derived from the bioconcentration factor of 81,700 for methylmercury calculated in 1975. The proposed criteria is the most recent USEPA criteria recommendation (CWA Section 304(a)) for the protection of aquatic life publish[ed] in 1995.

Following review by our Environmental Review Advisory Committee, the North Dakota Office of Attorney General and the legislative Administrative Rules Committee, DEQ adopted the 304(a) recommended criteria and other revisions to the state’s WQS (N.D. Admin. Code chapter 33.1-16-02.1). The revised WQS became effective on July 1, 2021. DEQ submitted the revised WQS to EPA for approval on June 15, 2021. Over 100 days have passed since then, and, as of the date of this letter, EPA has not notified the state of approval or disapproval, within the timeline required by 40 C.F.R. § 131.21(a).

DEQ’s adoption of the 304(a) recommended mercury criteria into its WQS should not cause any delay in EPA’s approval. As EPA has explained, “[w]here EPA has published recommended criteria, states should adopt water quality criteria based on EPA’s CWA section 304(a) criteria, section 304(a) criteria modified to reflect site-specific conditions, or other scientifically defensible methods.” Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92466-01, 92467 (Dec. 19, 2016) (citing 40 C.F.R. 131.11(b)). If a state adopts the 304(a) recommended criteria as part of its triennial review, no further explanation by the state to EPA is required. 40 C.F.R. § 131.20(a). And, the state has met 40 C.F.R. § 131.5’s requirement that it “protect the designated water uses based on sound scientific rationale

consistent with § 131.11.” 40 C.F.R. § 131.5(a)(2)1. Thus, DEQ’s revised mercury criteria is presumptively approvable and there is no reasonable basis for EPA to disapprove it.

In summary, DEQ has met its obligations to provide a set of standards compliant with the 8 items under 40 C.F.R. § 131.5. We respectfully ask that EPA comply with 40 C.F.R. § 131.21(a) and approve this revision of our Water Quality Standards. I look forward to discussing this with you at your earliest convenience, please call me at 701.328.5225 with any questions.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Karl Rockeman', followed by a long horizontal flourish.

Karl Rockeman, P.E.

Director

Division of Water Quality

c: L. David Glatt, P.E., Director, NDDEQ

Margaret I. Olson, Assistant Attorney General

¹ 40 C.F.R. § 131.5(a) lists 8 items on which EPA must base its review of a state’s WQS. The only other relevant item is (6), which requires a consideration of whether the state has followed applicable legal procedures for revising WQS. Here, DEQ met state rulemaking requirements, as explained in the North Dakota Attorney General’s legal opinion, and relevant federal requirements.